OCT 4 1994
OFFICE OF THE CLERK

No. 94-376

In The

Supreme Court of the United States

October Term, 1994

IRVING SULMEYER, CHAPTER 11 TRUSTEE,

Petitioner,

v.

PACIFIC BMW,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

PAMELA KOHLMAN WEBSTER
Counsel of Record
BUCHALTER, NEMER, FIELDS & YOUNGER
A PROFESSIONAL CORPORATION
601 South Figueroa Street
Suite 2400
Los Angeles, California 90017
(213) 891-5069

Attorneys for Respondent Pacific BMW

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

REASONS FOR DENYING THE PETITION 4

I. THIS COURT'S OPINION IN *BUTNER* DOES NOT CONFLICT WITH *WEGNER* 4

II. THE NINTH CIRCUIT'S RULINGS DO NOT HAVE THE DRACONIAN IMPACT PETITIONER SUGGESTS 7

III. THE CIRCUITS ARE NOT IN CONFLICT 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Bar Control of Colorado v. Gifford (In re Colacci's of America, Inc.), 490 F.2d 1118 (10th Cir. 1974) 8, 9

Butner v. United States, 440 U.S. 48 (1979) 4, 6

In re Coppie, 728 F.2d 951 (7th Cir. 1984), *cert. denied sub nom.* 469 U.S. 1105 (1985) 4

Griffel v. Murphy (In re Wegner), 839 F.2d 533 (9th Cir. 1988) 3, 4, 7, 8, 9

Kallen v. Ash, Anos, Freedman & Logan (In re Brass Kettle Restaurant, Inc.), 790 F.2d 574 (7th Cir. 1986)..... 4

Marks v. Goodyear Rubber Sundries, Inc., 238 F.2d 533 (2d Cir. 1956) 8, 9

Ralar Distributors, Inc. v. Rubbermaid, Inc. (In re Ralar Distributors, Inc.), 4 F.3d 62 (1st. Cir. 1993) 8

Riddervold v. Saratoga Hosp. (In re Riddervold), 647 F.2d 342 (2d Cir. 1981)..... 4

Stellwagen v. Clum, 245 U.S. 605 (1918)..... 6

United States v. Hall, 543 F.2d 1229 (9th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977) 5

CONSTITUTION

U.S. Const. art. I, § 8..... 4

U.S. Const. art. VI, cl. 2 4

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES

11 U.S.C. § 547 2

11 U.S.C. § 547(b) 4

MISCELLANEOUS

4 *Collier on Bankruptcy* ¶ 547.03 (15th ed. 1992)..... 4

No. 94-376

In The

Supreme Court of the United States

October Term, 1994

IRVING SULMEYER, CHAPTER 11 TRUSTEE,

Petitioner,

v.

PACIFIC BMW,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

Respondent Pacific BMW respectfully asks the Court to deny the Petition for Writ of Certiorari for the reasons stated below.

STATEMENT OF THE CASE

Petitioner's Statement of the Case in the Petition contains an error that requires correction. Petitioner states that the Ninth Circuit Court of Appeals applied "state laws involving rescission, rather than the federal preference laws" in this case. Petition at 4. In actuality, the Ninth Circuit, like the court below it, looked to the

laws of the State of California in order to determine whether the debtor had an interest in the property it transferred to Respondent pre-bankruptcy. The federal bankruptcy laws do not address what constitutes an interest of a debtor in property. Thus, the Ninth Circuit did not choose state law over federal law in making its determination. Instead, it merely used state law to help apply federal preference law.

SUMMARY OF ARGUMENT

This case does not present any issues that merit review by this Court. Contrary to the arguments in the Petition, the Ninth Circuit's decisions will not noticeably impact the administration of bankruptcy cases. Further, contrary to the arguments in the Petition, this is not a case of federal preemption. Finally, contrary to the arguments in the Petition, there is no conflict among the Circuit Courts of Appeal.

Succinctly stated, Section 547 of Title 11 of the United States Code (11 U.S.C. § 101 *et seq.*) allows a bankruptcy trustee to recover certain pre-bankruptcy transfers of property of the debtor. Federal bankruptcy law does not define what is or is not property of a debtor and has not, therefore, preempted the issue. Instead, the determination of whether the debtor had an interest is property is made by reference to applicable state law, if any. This does not create a conflict. Because the laws of the various states differ, the need to look to state law created by the

silence in the federal statute naturally means that different results may attend depending on which state's laws control.

In this matter, the Ninth Circuit properly referred to the laws of the State of California to determine if the debtor had a interest in the property it transferred to Respondent, which consisted of thirteen automobiles. Under California law, the debtor did not have an interest in the automobiles. Accordingly, the Ninth Circuit affirmed the decision of the District Court and found that no preference existed. Although the result may have been different had another state's laws been applied, there is no constitutional issue implicated.

Further, Petitioner grossly overstates the importance of the Ninth Circuit's unpublished decision in this case. As stated, the determination of the debtor's property interests was based on an application of California's very specific motor vehicle title statute. Similarly, *Griffel v. Murphy (In re Wegner)*, 839 F.2d 533 (9th Cir. 1988), criticized by Petitioner, was based on an interpretation of Montana's very specific livestock statute. These interpretations do not have widespread application.

Finally, there is no conflict between or among the Circuits that calls for resolution by this Court. Rather, the Circuits are in perfect accord. If under the law of the applicable state the property transferred was property of the debtor, all Circuits would likely find preference liability. If under the applicable state law the property was not property of the debtor, no Circuit would find liability.

REASONS FOR DENYING THE PETITION

I. THIS COURT'S OPINION IN *BUTNER* DOES NOT CONFLICT WITH *WEGNER*

In the Petition, the Trustee cites this Court's opinion in *Butner v. United States*, 440 U.S. 48 (1979) for the proposition that if a state law conflicts with a federal bankruptcy law, the state law is suspended to the extent of actual conflict. Respondent does not take issue with the fact that the Constitution gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States (U.S. Const. art. I, § 8), or with the impact of the Supremacy Clause (U.S. Const. art. VI, cl. 2). Respondent cannot, however, see how the Ninth Circuit's ruling in *Wegner*, upon which the decision in this case was based, evidences any violation of the Constitution.

A critical element of an avoidable preferential transfer under 11 U.S.C. § 547(b) is that an interest of the debtor in property be transferred pre-bankruptcy. As a noted commentator has stated, "The term 'interest of the debtor in property' is not defined in the Bankruptcy Code, however, and thus, '[w]e look to state law to determine whether property is an asset of debtor'." 4 *Collier on Bankruptcy* ¶ 547.03 at 547.22.1-22.2 (15th ed. 1992), footnotes omitted, citing *Kallen v. Ash, Anos, Freedman & Logan (In re Brass Kettle Restaurant, Inc.)*, 790 F.2d 574, 575 (7th Cir. 1986) ("We look to state law to determine whether property is an asset of a debtor."); *Wegner*; *Riddervold v. Saratoga Hosp. (In re Riddervold)*, 647 F.2d 342, 346 (2d Cir. 1981); and *In re Coppie*, 728 F.2d 951, 952-53

(7th Cir. 1984), *cert. denied sub nom.* 469 U.S. 1105 (1985). This does not create a conflict between the state and federal laws, nor does it run afoul of the doctrine of federal preemption. If in adopting the Bankruptcy Code, Congress signaled its intent to defer to and incorporate state law, then there can be no conflict. *See United States v. Hall*, 543 F.2d 1229, 1232 (9th Cir. 1976) ("The state law cannot preempt the federal unless the federal act itself sanctions the application of state standards."), *cert. denied*, 429 U.S. 1075 (1977).

Indeed, the very case relied on by Petitioner deferred to state law to determine property rights. The dispute in *Butner* was a bankruptcy trustee's and a mortgagee's competing claims to rents collected after the commencement of a bankruptcy case. The issue was whether the determination should be resolved by reference to state law, or whether there should be a uniform federal approach.

This Court noted that a split existed among the Circuits. The majority view of the Circuit Courts was that the issue should be resolved by reference to state law even though "[b]ecause the applicable law varies from state to state, the results in federal bankruptcy proceedings will also vary under the approach taken by most of the Circuits." *Id.* at 53. The minority of the Circuits adopted a federal rule of equity that varied the result that otherwise would be achieved under some state laws. "Those courts reason that since the bankruptcy court has the power to deprive the mortgagee of his state-law remedy, equity requires that the right to rents not be dependent on state-court action that may be precluded by federal law." *Id.*

This Court unanimously agreed with the majority view stating that although certain security interests and transfers can be set aside under bankruptcy law, "Congress has generally left the determination of property rights in the assets of a bankruptcy's estate to state law." *Id.* at 54. Further, quoting from *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918), in *Butner* this Court stated:

> Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States. For example, the Bankruptcy Act recognizes and enforces the laws of the States affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the act is not alike in all States.

Id. at 54 n. 9.

In *Wegner* and in this case the Ninth Circuit did exactly what *Butner* and the other decisions cited by Collier did. It looked to state law to answer the question left unaddressed by Congress: What constitutes an interest of the debtor in property? California has very specific laws governing the transfer of an interest in an automobile including explicit and material obligations of the seller that far exceed those required of a typical seller of goods. Montana has similarly specific laws concerning the transfer of livestock. Based on those detailed laws, the Ninth Circuit found in each case that neither party had fully performed their contractual obligations, the result of

which was that the sales contracts could be mutually rescinded. The uncontroverted evidence adduced by the trial court was that the parties had in fact mutually rescinded their contracts. Therefore, by proper application of controlling state laws, the Ninth Circuit found one element of preference liability missing.

The trustee also argues that *Wegner* and this case conflict with federal law because they defeated a trustee's ability to recover an otherwise avoidable preference. Petition at 11. Firstly, the record will not support a finding that there was an otherwise avoidable preferential transfer. The District Court reversed the Bankruptcy Court on three separate grounds only one of which was addressed by the Ninth Circuit. *Compare* Appendix A and Appendix B. Secondly, even though the reference to state law may result in a smaller estate because otherwise avoidable preferences cannot be recovered, it does not cause a conflict with federal law or with the Constitution. *Butner,* 440 U.S. at 54 n. 9.

In sum, the approach used by the Ninth Circuit in *Wegner* and in this case was sound and does not need to be reviewed by this Court.

II. THE NINTH CIRCUIT'S RULINGS DO NOT HAVE THE DRACONIAN IMPACT PETITIONER SUGGESTS

Petitioner would have the Court believe that the Ninth Circuit decisions in *Wegner* and in this case (i) encourage creditors to improperly camouflage a pre-petition transfer as a rescission in order to avoid preference liability, (ii) destroy the ability of bankruptcy trustees to

recover preferential transfers, and (iii) cause chaos in the administration of bankruptcy cases. Petition at 5. This is gross hyperbole.

This case concerned a technical application of California's motor vehicle registration law. *Wegner* was a technical application of Montana's livestock transfer law. The Ninth Circuit's holdings in each case have no application to garden variety sales of goods even if those goods are returned to the seller pre-petition because in most situations the seller has fully performed when the goods are delivered. The seller's full performance would defeat mutual rescission under the Ninth Circuit's analysis.

No greater evidence of these decisions' narrow utility is there than the fact that since *Wegner* was decided in 1988, it has been cited as authority in only one other published preference decision, and then only in passing. *See Ralar Distributors, Inc. v. Rubbermaid, Inc. (In re Ralar Distributors, Inc.)*, 4 F.3d 62, 68 (1st Cir. 1993). Surely if it were the deathknell for preference recoveries by a bankruptcy estate, it would have drawn more attention.

III. THE CIRCUITS ARE NOT IN CONFLICT

Petitioner argues that *Wegner* is inconsistent with the opinion of the Second Circuit Court of Appeals in *Marks v. Goodyear Rubber Sundries, Inc.*, 238 F.2d 533 (2d Cir. 1956) and the opinion of the Tenth Circuit Court of Appeals in *Bar Control of Colorado v. Gifford (In re Colacci's of America, Inc.)*, 490 F.2d 1118 (10th Cir. 1974). Petitioner

is not correct; the decisions are not inconsistent. In fact, they do not even address the same issues.

The question in *Wegner* was whether the debtor had an interest in the property transferred. In *Marks*, the Second Circuit examined whether the creditor had reasonable cause to believe the debtor was insolvent when the property, the nature of which was not identified, was returned to the seller. That the debtor had an interest in the property was apparently presumed because the issue was not discussed in the opinion. If it was not property of the debtor, the holding in *Marks* should have been the same as in *Wegner*. Conversely, if in *Wegner* the Ninth Circuit had found that the cattle were property of the debtor when they were returned, like *Marks* it too would have found preference liability.

In *Colacci's*, there was a specific finding by the trial court that the debtor had title to bar equipment at the time it was delivered back to the seller, which finding was not challenged on appeal. Instead, the question at issue was whether the seller was reclaiming or repossessing the equipment. If the equipment was not the debtor's, presumably the Tenth Circuit would also have ruled that there was no preferential transfer. Conversely, if the Ninth Circuit had found that the cattle were property of the debtor when they were returned, like *Colacci's* it too would have found preference liability.

Hence, since there is no conflict among the Circuits on the issue addressed in *Wegner*, there is even less reason for this Court to grant the Petition.

CONCLUSION

For the foregoing reasons, Respondent submits that the Petition for Writ of Certiorari should be denied.

DATED: October 4, 1994.

Respectfully submitted,

PAMELA KOHLMAN WEBSTER
Counsel of Record
BUCHALTER, NEMER, FIELDS & YOUNGER
A PROFESSIONAL CORPORATION
601 South Figueroa Street
Suite 2400
Los Angeles, California 90017
(213) 891-5069

Attorneys for Respondent Pacific BMW